Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, December 3, 2015

2. UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

A. REPORT OF THE APPELLATE BODY (WT/DS381/AB/RW AND WT/DS381/AB/RW/ADD.1) AND REPORT OF THE PANEL (WT/DS381/RW, WT/DS381/RW/ADD.1 AND WT/DS381/RW/CORR.1)

- The United States would like to thank the members of the compliance Panel, the Appellate Body, and the Secretariat assisting them for their work on these proceedings.

- Mr. Chairman, let me first make some overarching comments on these reports, and then move to some specific points.

- These compliance proceedings were supposed to be concerned with whether the amendments made by the United States in 2013 in response to the findings of the panel and the Appellate Body in the original proceeding brought the United States into compliance with the DSB recommendations and rulings.

- The DSB recommendations and rulings were that the U.S. dolphin safe labeling measure was inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") because the United States did not require a certification for tuna caught outside the Eastern Tropical Pacific Ocean ("ETP") that no dolphins were killed or seriously injured, while noting that this did not require that the certification be made by an observer on board the vessel.[1]

- The United States amended its measure in direct response to the DSB recommendations and rulings, and fully addressed the concerns with the U.S. measure that were identified in the panel and Appellate Body reports.

- In this regard, the United States appreciates that both the Panel and the Appellate Body agreed that the amended measure moved the measure towards compliance.

- The reports reaffirm that the objectives pursued by the U.S. measure – consumer information and protecting dolphins – are proper ones for WTO purposes. Nothing in the Panel or Appellate Body findings to be adopted today call for the United States to reduce or compromise consumer information or the protection of dolphins.

[1] *US – Tuna II (Mexico) (AB)*, para. 296.

- Furthermore, the United States appreciates that the Appellate Body reversed two of the Panel's findings that the amended measure was inconsistent with the TBT Agreement.

- That said, the panel and Appellate Body reports raise a number of very serious concerns.

- The Appellate Body found the amended dolphin-safe labeling measure to be inconsistent with the WTO because of one element of the measure – but that element was in the original measure, was unchanged, and was not argued by Mexico.

- That element is the so-called "determination provisions." These provisions provide for the possibility of requiring observers on board vessels to certify to the dolphin-safe nature of tuna where the Secretary of Commerce determines (1) for purse seine fisheries outside the ETP that there is a "regular and significant tuna-dolphin association"; and (2) for non-purse seine fisheries that there is "regular and significant mortality or serious injury of dolphins." The Secretary has never made a determination under these provisions – for the simple reason that there is no evidence that such a fishery exists.

- The Appellate Body faulted these provisions not for what they provide but for what they do not provide. In particular, the Appellate Body considered that the possibility of a purse seine fishery in which there is "regular and significant" dolphin mortality *without* a regular and significant tuna-dolphin association, or of a non-purse seine fishery where there is a harmful "regular and significant" tuna-dolphin association *without* "regular and significant" dolphin mortality, rendered the U.S. measure not even-handed.

- The Appellate Body's analysis is of deep concern in a number of respects.

- First, this was a question of *de facto* discrimination. Yet the Appellate Body concluded that the U.S. measure was inconsistent with the covered agreements based solely on provisions that had never been applied. Consequently, there were no facts beyond the face of the measure on which the Appellate Body relied.

- The Appellate Body itself stated that its "analysis regarding the determination provisions is premised on the existence of risks outside the ETP large purse-seine fishery that are comparably high to the risks existing in the ETP large purse-seine fishery."[2] This premise, however, was not supported by any factual findings that such risks existed.

- Instead, the Appellate Body based its findings of *de facto* discrimination on "the design, structure, and expected operation of the measure." The Appellate Body does not identify whose expectations are being considered or what the evidence was for the "expected operation."

[2] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.265.

- And indeed, there was no evidence on the record that either type of fishery specified in the "determination provisions" existed anywhere in the world. Further, neither the Panel nor the Appellate Body suggested that there was any evidence that a fishery falling into either theoretical "gap" in the provisions existed. Consequently, there could be no basis to expect that the "determination provisions" would ever be operational.

- On closer examination then, the Appellate Body's "expected operation" appears to be based not on facts, but on speculation as to what might happen in a hypothetical situation. And that hypothetical situation was one for which there were no facts and no basis to expect that it could occur.

- We do not see how this can be reconciled with the legal requirements for a finding of a *de facto* inconsistency. Instead, the Appellate Body appears to have found the measure to be "as such" inconsistent due to purely hypothetical situations it considered could represent "gaps".

- In this regard, the Appellate Body report is also troubling because it appears to signal that a measure with purely hypothetical gaps will be found inconsistent unless the responding Member proves that a challenged measure could never be discriminatory, even in relation to hypothetical scenarios.

- Furthermore, the "determination provisions" had nothing to do with the complaint of Mexico regarding trade. Since these provisions had never been applied and there were no facts to support that they ever would apply, they were not affecting the conditions of competition for Mexican tuna products. And they had never affected the labeling of tuna products.

- Reaching out to address this hypothetical situation involving provisions that had never been applied does nothing for trade with Mexico. Rather, it would appear to be an academic exercise unrelated to trade in Mexican products.

- Thus, the finding of inconsistency was based on speculation about a hypothetical situation removed from the trade issue involved in the dispute. This would appear contrary to the reason for the dispute settlement system of the WTO. That system is there to settle actual trade disputes, not to engage in speculation or make findings about hypothetical situations.

- The Panel and Appellate Body findings are also troubling because the "determination provisions" were unchanged from the original measure. Mexico could have made claims against them in the original proceeding but did not.

- Allowing Mexico to challenge for the first time in the compliance proceeding an element of the measure that it could have, but did not, challenge in the original proceeding undermines the functioning of the WTO dispute settlement system.

- An Article 21.5 proceeding has a compressed timeline and a limited scope, compared to the original proceeding, and the responding party is not afforded any reasonable period of time to come into compliance with the findings in a compliance proceeding.

- Further, the amended measure was found to be inconsistent based solely on an element that Mexico never raised as part of its affirmative case but that the Panel raised on its own initiative late in the proceedings.

- In fact, Mexico did not advance any legal arguments concerning the "determination provisions" until its response to Panel question 60, in its seventh written submission, well after the Panel meeting. The Appellate Body report confirmed this, in that it did not refer to *any* legal argumentation in Mexico's affirmative case that concerned the design, structure, or operation of the "determination provisions."[3]

- This is contrary to the well-established principle that a panel may not use its interrogative powers to make the case for the complaining Member.[4]

- With respect to the Appellate Body's reversal of the Panel findings on other elements of the measure, the Appellate Body found that it could not complete the analysis. In fact, however, the Panel had made factual findings on which the Appellate Body could have relied in completing the analysis.

- In particular, the Panel found that the evidence on the record established that the risks faced by dolphins in the ETP from repeated chasing and capturing by large purse seine vessels are quantitatively and qualitatively distinct from the risks dolphins face in other fisheries, such that the ETP large purse seine fishery has a different "risk profile" than other fisheries.[5] Further, the Panel explicitly disagreed with Mexico's argument that "the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries."[6] Later in its report, the Panel again referred to "the higher risk posed to dolphins by setting on dolphins in the ETP" and to the "special risk profile of the ETP large purse seine fishery."[7]

- The Panel findings thus provided an ample basis on which the Appellate Body could have completed the analysis of the aspects of the amended measure in order to reject

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[3] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.178.

[4] *US — Wool Shirts and Blouses (AB)*, p. 16; *India – Patents (US) (AB)*, para. 73; *US – COOL (AB)*, para. 286; *US – Gambling (AB)*, para. 140; *US – Certain EC Products (AB)*, para. 113; *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

[5] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-243 (majority opinion), para. 7.398.

[6] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242 (majority opinion); *id.* para. 7.278 (minority opinion).

[7] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398.

contentions by Mexico that were actually part of Mexico's affirmative challenge in this dispute.

- Finally, it is important to recognize the serious systemic concerns raised by the Panel and Appellate Body reports.

- Each Member here today and all Members should be concerned about the implications of the approach in this dispute. As the United States and several third parties noted, WTO rules reflect, as they must, that there is space in which Members can regulate in the public interest. The dispute settlement system must recognize the same. Panels and the Appellate Body should not make their conception of the "perfect" measure the enemy of all the possible good ones. In pursuing legitimate objectives, Members should not be held to the impossible standard of designing and applying a measure that corresponds exactly to the one that a panel or the Appellate Body would have designed to achieve the legitimate objective at issue. Regulators design measures to address facts, risks, and situations actually presented, not premises and hypothetical scenarios.

- Finally, the fact that both the Panel and the Appellate Body acknowledged that the United States had addressed the problem identified in the DSB recommendations and rulings but nonetheless found that the measure breached WTO rules for other reasons – reasons that could have been but were not raised in the original proceeding – sends a troubling signal to Members. It signals that despite a responding Member's best efforts at compliance, Members can have no confidence that the DSB recommendations and rulings provide clarity on what needs to be done. Rather, under the approach used in this dispute, compliance with recommendations and rulings only opens the door for ongoing challenges, inviting complaining parties to devise new criticisms and arguments.

Second Intervention

- Our statement was clear. We are not simply repeating arguments from the dispute; rather we have explained how the panel and Appellate Body reports raise a number of very serious concerns. We would encourage all Members to review these reports carefully.